

A.P.R.A. Fuel Oil Buyers Group, Inc., Prudential Transportation, Inc. and Amer-National Heating Service, Inc. and Local 553, International Brotherhood of Teamsters, AFL-CIO. Case 29-CA-17288

September 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On July 30, 1993, the General Counsel of the National Labor Relations Board issued an amended complaint alleging that A.P.R.A. Fuel Oil Buyers Group, Inc. (APRA), Prudential Transportation, Inc. (Prudential), and Amer-National Heating Service, Inc. (Amer-National), collectively, the Respondent, have violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing the request of Local 553, International Brotherhood of Teamsters, AFL-CIO, the Union, to bargain following the Union's certification in Case 29-RC-7760. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).)¹ The Re-

spondent filed its answer and amended answer denying most of the allegations in the amended complaint and asserting various affirmative defenses.

On August 23, 1993, the General Counsel filed a Motion for Summary Judgment. On August 26, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On September 9, 1993, the General Counsel filed a statement in support of its motion. On September 13, 1993, the Respondent filed a statement in opposition to the Motion for Summary Judgment and on September 23, 1993, filed a statement in opposition to the General Counsel's September 9, 1993 statement.

Ruling on Motion for Summary Judgment

In its answer and amended answer to the amended complaint, the Respondent denies its refusal to bargain and attacks the validity of the certification on the basis of the disposition of certain challenged ballots, the unit determination, and affirmative defenses which it had previously asserted or could have asserted in the representation and unfair labor practice proceedings.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence,² nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).³

consolidated complaint cases for purposes of seeking enforcement of the Board's Orders.

²In its amended answer and its response to the Notice to Show Cause, the Respondent states that it discovered as a result of an August 12, 1993 response to a Freedom of Information request that two of the General Counsel's witnesses, Victor Benavides and Alberto Guzman, were using false and fraudulent names. The Respondent claims that this information was concealed from it by the Union and the Board and that the information could have affected the credibility of witnesses and tainted the hearing proceedings and would have affected the results of the election. The Respondent requests that the hearing be reopened in order that it be allowed to show that the testimony of these witnesses was fraudulent. Our review of the proceedings below indicates that this information was elicited on the record before the administrative law judge. See JD at 495-496. Moreover, even were Benavides and Guzman excluded from the list of eligible votes, this would not affect the Union's majority status.

³Specifically, the Respondent denies the appropriateness of the bargaining unit arguing that dispatchers in the heating oil business are managerial and supervisory. The Respondent also argues that participation of supervisors in the Union's organizational campaign and the election requires that the election be set aside and the petition dismissed. The Respondent claims that placement of two dual-function individuals in the unit was inappropriate and that errors of law and fact in the preelection determination and other errors of law

Continued

¹On February 6, 1991, the Regional Director issued a Decision and Direction of Election finding, inter alia, that the petitioned-for unit of drivers, servicemen, dispatchers, and mechanics was appropriate. The Respondent did not request review of this decision. On March 6, 1991, the election was held. The tally of ballots reflected that there were 25 valid votes counted of which 5 were for the Union, 7 were against the Union, and 13 were challenged and were thus determinative of the outcome. The Union filed timely objections to conduct affecting the election. On July 18, 1991, the Regional Director issued a supplemental decision on objections and challenges, order consolidating cases and notice of hearing. The representation case was thus consolidated for hearing with consolidated complaints issued on March 11 and 18, and May 16 and 28, 1991. In addition, the Regional Director overruled one challenge, sustained one challenge, and directed that the remaining challenges be resolved by the administrative law judge. Following the hearing held in August 1991, Administrative Law Judge Joel P. Biblowitz issued his decision on November 8, 1991, inter alia, resolving nine challenged ballots by overruling six and sustaining three and finding objectionable conduct affecting the election. The judge found numerous unfair labor practices as well and found that these warranted a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). On November 12, 1992, we issued a decision affirming the judge's decision in relevant part. See *A.P.R.A. Fuel Oil*, 309 NLRB 480. In addition to the *Gissel* bargaining order provided for in the judge's decision, we also ordered that the overruled challenged ballots be opened and counted and that, if the Union received a majority of the valid votes plus challenges, a certification of representative issue. 309 NLRB at 482. Accordingly, Case 29-RC-7760 was remanded to the Regional Director. On November 20, 1992, the Regional Director issued a corrected, revised tally of ballots indicating that 11 votes were cast for the Union and 8 votes were cast against the Union. Based on this tally, the Regional Director concluded that a majority of the valid votes plus challenged ballots were cast for the Union. On December 9, 1992, a certification of representative issued. We find that it will effectuate the policies of the Act to consolidate the instant refusal-to-bargain case with the above-mentioned

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

APRA, Prudential, and Amer-National are each New York State corporations located at a common facility in the borough of Brooklyn, city and State of New York. APRA is engaged in the cooperative purchase of heating fuel oil for its members, and related services. Prudential is engaged in the transportation and delivery of fuel oil to APRA's members and to other customers located throughout the city of New York. Amer-National is engaged in servicing oil and gas burners for APRA's members and other customers located throughout the city of New York.

During the year ending July 30, 1993, APRA derived gross revenues in excess of \$500,000 and purchased and received at the Brooklyn facility goods, materials, and fuel oil valued in excess of \$50,000 from other enterprises located within the State of New York, each of which other enterprises had received the goods, materials, and fuel oil directly from points outside the State of New York.

such as errors in the disposition of challenges to election ballots preclude a finding of refusal to bargain. All of these issues were or could have been raised in the underlying representation proceeding. The Respondent has not offered to produce any newly discovered and previously unavailable evidence and has not alleged that special circumstances exist which would require reexamination of these issues.

The Respondent claims that participation of two individuals in the election was improper pursuant to the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a and the petition should be dismissed because the Union never achieved clear majority support. This issue was or could have been raised in the underlying representation proceeding. The Respondent has not offered to adduce any newly discovered and previously unavailable evidence and has not alleged that special circumstances exist which would require reexamination of this issue. However, we note with regard to this affirmative defense that on July 28, 1993, we issued an Order sua sponte reconsidering our Decision, Order, and Direction reported at 309 NLRB 480 and severed the portion of the remedial order which dealt with the two individuals implicated pursuant to IRCA. The portion of our decision which was severed related only to the remedy for the unlawful discharges of these two individuals. Their eligibility to participate in the election, our finding of unlawful discharge, and the Union's majority status were not affected by this Order. The Respondent's claims to the contrary misconstrue the Order.

Finally, the Respondent denies that the Union filed the underlying charge in this proceeding and that the charge was served by certified mail on the Respondent. Counsel for the General Counsel has attached as an exhibit to his Motion for Summary Judgment a copy of the return receipt for certified mail showing that the charge was served on the Respondent. In its answer to the Notice to Show Cause, the Respondent has not contested the authenticity of the exhibit or offered to produce any further information. We find that the charge underlying the complaint was filed and was served by certified mail on the Respondent.

During the year ending July 30, 1993, Prudential derived gross revenues in excess of \$300,000 and purchased and received at the Brooklyn facility goods, supplies, materials, and repair parts valued at approximately \$10,000 from other enterprises located within the State of New York, each of which other enterprises received the goods, supplies, materials, and repair parts directly from points outside the State of New York.

During the year ending July 30, 1993, Amer-National derived gross revenues in excess of \$400,000 and purchased and received at the Brooklyn facility goods, supplies, materials, and oil and gas burner parts valued at approximately \$20,000 from other enterprises located within the State of New York, each of which other enterprises received the goods, supplies, materials, and repair parts directly from points outside the State of New York.

APRA, Prudential, and Amer-National have been affiliated business enterprises with common officers, owners, directors, operators, management and supervision; have formulated and administered a common labor policy affecting employees of their operations; have shared common premises, facilities, advertising and phone lines; have provided services and made sales to each other; and have held themselves out to the public as a single-integrated business enterprise. By virtue of their operations APRA, Prudential, and Amer-National constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

We find that APRA, Prudential, and Amer-National individually and collectively are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.⁴

⁴ With one minor exception, the Respondent has denied all the jurisdictional information, its single-employer status, and the Union's status as a labor organization. In the underlying representation proceeding, the Respondent stipulated to the commerce information but denied that it was an employer engaged in commerce within the meaning of the Act, denied its status as a single employer within the meaning of the Act, and denied the Union's labor organization status. The Regional Director's Decision and Direction of Election issued February 6, 1991, finding that the Respondent is a single employer, the Respondent is an employer engaged in commerce within the meaning of the Act, and the Union is a labor organization. The Respondent did not request review of the Regional Director's decision and the Respondent does not offer to adduce any newly discovered and previously unavailable evidence regarding these matters. These matters were resolved in the underlying representation proceeding and may not be relitigated here. Moreover, we note that the Respondent admitted its status as an employer engaged in commerce and admitted the Union's status as a labor organization in the unfair labor practice proceedings reported at 309 NLRB 480. It also admitted single-employer status for purposes of those proceedings which included the underlying representation proceeding involved here. Finally, we note that in its answer to the complaint the Respondent did not admit or deny that APRA is a New York corporation located in the borough of Brooklyn in the city and State of New York en-

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held March 6, 1991, the Union was certified on December 9, 1992, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers, servicemen, dispatchers and mechanics employed by the Respondent at its Brooklyn, New York location, excluding all other employees, office clerical employees, managers, guards and supervisors, as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since December 28, 1992, and June 28, 1993, the Union has requested the Respondent to bargain, and, since on or about December 29, 1992, the Respondent has refused.⁵ We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By refusing on and after December 29, 1992, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist, to bargain on request with the Union,

gaged in the cooperative purchase of heating fuel oil for its members, and related services. This allegation is deemed admitted.

⁵In its answer to the complaint, the Respondent denies that the Union has requested that it bargain since December 28, 1992, and June 28, 1993. The Respondent further denies that it has refused to bargain since on or about December 29, 1992. We find these denials raise no issue warranting a hearing. We note that the Respondent does not challenge the authenticity of letters dated December 28, 1992, and June 28, 1993, appended to the Motion for Summary Judgment in which the Union requested bargaining. Moreover, we also note that the Respondent has not offered to produce evidence that it in fact bargained with the Union. Its affirmative defenses to the complaint assert that the certification is invalid, that the unit is inappropriate, and that the Union lacks majority status. In its response to the Notice to Show Cause, the Respondent attacks the certification, in part, because the election was decided by only three votes. Under these circumstances we find that the bargaining requests were made and we also find that the Respondent has refused to bargain. See *Hydro Conduit Corp.*, 242 NLRB 171, 172 fn. 5 (1979).

and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, A.P.R.A. Fuel Oil Buyers Group, Inc., Prudential Transportation, Inc. and Amer-National Heating Service, Inc., jointly and severally, Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 553, International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers, servicemen, dispatchers and mechanics employed by the Respondent at its Brooklyn, New York location, excluding all other employees, office clerical employees, managers, guards and supervisors, as defined in the Act.

(b) Post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 29-CA-17288 is consolidated with Cases 29-CA-15517, 29-CA-15589, 29-CA-15518, 29-CA-15446, 29-CA-15459, 29-CA-15571, 29-CA-15467, and 29-CA-15482 for purposes of seeking enforcement of the instant Order and the Order reported at 309 NLRB 480 (1992), as modified by the July 28, 1993 Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 553, International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time drivers, servicemen, dispatchers and mechanics employed by us at our Brooklyn, New York location, excluding all other employees, office clerical employees, managers, guards and supervisors, as defined in the Act.

A.P.R.A. FUEL OIL BUYERS GROUP,
INC., PRUDENTIAL TRANSPORTATION,
INC. AND AMER-NATIONAL HEATING
SERVICE, INC.